United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-2082

To be argued by
DUGALD CAMPBELL BROWN

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

FOTOCHROME, INC.,

Debtor-Appellant,

-against-

COPAL COMPANY LIMITED,

Claimant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF OF CLAIMANT-APPELLEE

WHITMAN & RANSOM
Attorneys for Claimant-Appellee
522 Fifth Avenue
New York, New York 10036
575-5800

DUGALD CAMPBELL BROWN
WILLIAM M. KAHN
GILLARD S. GLOVER
Of Counsel

COUNSEL PRESS, INC., 55 West 42nd Street, New York, N.Y. 10036 • PE 6-3460

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Preliminary Statement

The Debtor-Appellant herein, Fotochrome, Inc. ("Fotochrome"), filed a petition for arrangement under Chapter XI of the Bankruptcy Act (the "Proceeding"), 11 U.S.C. §701 et seq., on March 26, 1970 [1a]* Copal Company Limited ("Copal") filed a claim in the Proceeding on October 22, 1970 [13a]. This claim was based on an arbitral judgment of the Japan Commercial Arbitration Association ("JCAA") [17a]. Fotochrome objected to the

* References in brackets are to the Record on Appeal.

claim and requested a hearing on the objection [61a]. By a memorandum opinion and order dated July 31, 1973, the Bankruptcy Court (Honorable C. Albert Parente, Bankruptcy Judge [then Referee in Bankruptcy]) ordered that Fotochrome was entitled to a hearing on the objection to Copal's claim [116a]. Copal appealed from the order of July 31, 1973, to the United States District Court for the Eastern District of New York (Jack B. Weinstein, U.S.D.J.) which reversed the decision of the Bankruptcy Judge in an opinion dated June 4, 1974. [144a] Fotochrome Inc. v. Copal Company Limited, 377 F. Supp. 26 (E.D.N.Y. 1974). This appeal followed [164a].

The Issues Presented For Review

1. Whether the arbitral judgment of the JCAA must be enforced as a provable debt in bankruptcy proceedings in accordance with the Treaty with Japan on Friendship, Commerce and Navigation and the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards?

2. Whether Fotochrome was denied due process of law in the arbitration proceedings before the JCAA?

STATEMENT OF THE CASE

Nature of the Case

This case involves the refusal of Fotochrome to accept, as a provable claim, an arbitral judgment rendered by the JCAA in favor of Copal.

Course of Proceedings and Determinations of the Courts Below

After Fotochrome had filed a petition for arrangement, the Referee in Bankruptcy attempted to stay prior commenced arbi-

tral proceedings between Fotochrome and Copal which were being held in Japan before the JCAA. Because the Referee's stay, which was cabled to the JCAA, was without extraterritorial effect and the Rules of the JCAA prevented the tribunal from halting the arbitration, the arbitration continued and an arbitral judgment was rendered to Copal [17a]. Under Japanese law, this arbitral judgment was a final and enforceable judgment. Accordingly, Copal then filed a proof of claim based on the arbitral judgment in the Proceedings [13a]. Fotochrome objected to the allowance of the claim.

A hearing was held before the Bankruptcy Referee [63a] during which time summary translations of the proceedings in arbitration and translations of the arbitral minutes were presented to the Court [67a]. Additionally, Copal's expert witness testified as to the applicable provisions of Japanese law relating to arbitration [78a]. Upon the conclusion of this hearing the Referee ruled that Fotochrome was entitled to a hearing on the objections to Copal's claim [116a-143a]. Upon appeal, the Referee's decision was reversed by the District Court for the Eastern District of New York [144a].

Statement of Facts

A. The Parties

Fotochrome is a Delaware corporation with offices located in the State of New York. Fotochrome is engaged in the sale and distribution of cameras, accessories and their component parts. [20a]

Copal is a Japanese corporation with no offices in the United States. Copal manufactures cameras, projectors, shutters and other photoelectric equipment. [20a]

B. The Agreement

On April 25, 1966, Fotochrome and Copal entered into an agreement ("Agreement"). The terms of the Agreement related to the manufacture of a camera ("Foto-camera") by Copal in Japan and the United States distribution of this camera by Fotochrome.

The Foto-camera was to be a uniquely designed camera which utilized a special roll film as printing paper and was to be capable of producing a black and white or color positive print directly upon developing film.

The terms of the Agreement required Fotochrome to provide specifications for the Foto-camera. Fotochrome further agreed to provide Copal with all molds, tools, dies, jigs and other equipment which were necessary to the manufacture of the Foto-camera and to underwrite the cost of production or acquisition of such necessary equipment. [21a-22a]

Moreover, the Agreement obligated Fotochrome to purchase, for distribution in the United States, a total of 250,000 sets of Foto-cameras and to open irrevocable letters of credit in favor of Copal at least three months in advance of each scheduled date of shipment which was set forth in the Agreement. [23a]

The Agreement specifically provided for the final settlement of:

> Any and all disputes that may arise between the parties out of or in relation to or in connection with the Agreement or breach thereof by arbitration to be held in Tokyo, Japan. [21a]

C. Termination

On May 2, 1966, Fotochrome opened an irrevocable letter of credit in an amount equal to the cost of 19,300 sets of Foto-

cameras but refused to open subsequent letters of credit although Copal made several requests therefor. [23a]

Because of Fotochrome's failure to open the necessary irrevocable letters of credit as contemplated by the parties' Agreement, Copal by registered letter dated December 22, 1966, terminated the Agreement [24a].

D. The Arbitration

In 1967, Copal filed its petition with the JCAA which demanded that Fotochrome be required to pay Copal damages in the amount of $631,501.13 together with interest computed at a rate of six percent per annum from January 1, 1967 and that the entire cost of the arbitration proceedings be borne by Fotochrome [20a].

Copal's petition asserted that:

1. Fotochrome failed to timely deliver the molds tools, jigs and other equipment which was necessary in the manufacture of the Foto-camera; [30a, 31a]

2. Fotochrome failed to effect the delivery of certain drawings, specifications and the inspection standard which was necessary to the production of the Foto-camera; [30a]

3. Fotochrome caused certain defective parts, essential to the manufacture of the Foto-camera, to be delivered which necessitated several changes in the composition plan; [30a]

4. Fotochrome's failure in timely supplying those items which were necessary to the manufacture of the Foto-camera resulted in Copal's inability to meet the delivery schedule; [30a]

5. Fotochrome failed to open letters of credit in favor of Copal as required by the parties' Agreement even though Copal, by letters, cables and finally in person by its representative, requested that the letters of credit be opened; [24a, 28a]

6. In performance of the terms of the parties' Agreement, Copal manufactured 12,283 complete sets of Foto-cameras and a large number of semi-assembled cameras for which it should be compensated because the unique nature of the Foto-camera makes these cameras completely unsaleable and unmarketable without the specially designed film which is under the control of Fotochrome. [25a]

E. Fotochrome Answering Statement

On July 31, 1968, Fotochrome filed its answering statement in the arbitration proceedings before the JCAA. This answering statement requested that the tribunal dismiss the petition of Copal and award Fotochrome judgment on its counterclaim in the amount of $828,582. [38a]

In support of its requested relief, Fotochrome asserted that:

1. Copal was not obligated to commence manufacture of the Foto-camera, or to purchase those items which were indispensable to the manufacture of the Foto-camera until Fotochrome furnished Copal with a letter of credit in an amount equal to the cost of the proposed shipment of Foto-cameras; [35a]

2. Copal's failure to deliver the cameras in accordance with the parties' delivery schedule was a breach of the parties' contract; [37a]

3. That the parties' Agreement did not require Fotochrome to deliver first quality parts and materials to be used by Copal in the production of the Foto-camera; [39a]

4. That the delivery of adequate drawings, specifications and inspection standards was not a condition precedent to Copal's responsibility to meet the delivery schedule, as set forth in the parties' Agreement; [39a]

5. That Copal's failure to comply with the delivery schedule as set forth in the parties' Agreement resulted in, inter alia, $828,582 of lost profits. [38a]

F. The Proceedings Before The JCAA

On December 21, 1967, the evidentiary proceedings before the JCAA were commenced. Copal presented its entire case, including several witnesses and extensive documentary proof, in a total of sixteen sessions. Counsel for Fotochrome, Michael A. Braun, Esq., was present at each of these sessions and participated therein. [109a, 110a]

During the fourteenth session of the proceedings, counsel for Fotochrome requested that he be allowed to examine two witnesses on Fotochrome's behalf and the tribunal scheduled these examinations for October 31, 1969 and November 5, 1969. Fotochrome failed to produce its witnesses for examination. [110a] The JCAA rescheduled the examination of Fotochrome's witnesses for December 4, 1969, but again Fotochrome failed to produce its witnesses. [110a] Once again the tribunal scheduled the examination of Fotochrome's witnesses for January 27, 1970, and again Fotochrome failed to produce its witnesses. [110a]

On January 27, 1970, Fotochrome's counsel was informed by the tribunal that its failure to produce its witnesses at the next session could result in termination of the arbitration

proceedings. [110a] The JCAA then scheduled the next session for March 31, 1970.

G. The Stay Order

On March 26, 1970, Fotochrome filed a petition for arrangement in the Federal District Court for the Eastern District of New York. By order dated March 27, 1970, Referee Sherman Warner entered an order staying "any actions, suits, arbitrations, or the enforcement of any claims in any Court against the debtor or taking any further steps or proceedings except before this Court", against the debtor. [118a]

On March 31, 1970,counsel for Fotochrome presented to the JCAA a cable from New York which referred to the stay order of the Federal District Court for the Eastern District. Fotochrome's counsel refused to present his witnesses at this session even though he had been previously informed by the JCAA that his failure to so present his witnesses could result in the termination of the proceedings. [111a]

By letter dated April 8, 1970,Mr. Braun, Fotochrome's attorney, informed the JCAA that he had been discharged by Fotochrome and could no longer attend the proceedings on behalf of Fotochrome. [113a]

On April 9, 1970, the JCAA convened to consider what effect Fotochrome's withdrawal from the arbitration proceedings and the stay order of the Federal District Court would have upon future sessions of the JCAA. Counsel for Copal stated that the tribunal was entitled to proceed with the arbitration

even though Fotochrome was absent. [113a]

The JCAA requested that Copal set forth its position in a brief and scheduled another session subsequent to the receipt by the tribunal of Copal's brief. [114a]

On July 2, 1970, the arbitrators, after due consideration, decided that they were empowered to render an award and ordered the proceedings closed. [115a]

H. The Award

On September 18, 1970, after careful consideration of the merits of each party's asserted basis of recovery, the JCAA handed down its arbitration award in the amount of $624,457.80 with interest at six percent per annum from January 1, 1967 to the date of payment in full. [19a]

The JCAA dismissed the counterclaim of Fotochrome in its entirety after carefully considering each aspect thereof. On October 21, 1970, this arbitration award was deposited with the Tokyo District Court and, pursuant to the provisions of Article 800 of The Japan Code of Civil Procedure, had the same effect as a final and conclusive judgment. [86a, 87a, 150a]

I. Copal's Proof of Claim

On October 22, 1970, Copal filed a proof of claim in the bankruptcy proceedings in the amount of the arbitral judgment. [119a] Fotochrome's attorney objected to Copal's claim and requested a hearing. [119a] Copal opposed the hearing on the ground that the arbitral judgment of the JCAA was final and conclusive and consequently the Bankruptcy Court was without power to relitigate the merits of the issues determined by the

JCAA. The Bankruptcy Judge held a hearing on the preliminary matters [64a-100a] and on July 31, 1973, rendered a decision which stated:

> 1. That the Bankruptcy Court is empowered to look behind a judgment to ascertain on the merits the nature of the debtor's liability. [142a]
>
> 2. That the Bankruptcy Court by the issuance of a restraining order effectively imposed its paramount authority over the estate of the debtor in possession ousting the jurisdiction of the JAPAN CAA. [142a]
>
> 3. That the arbitration award rendered by the JAPAN CAA was not self executing as a judgment in the United States so as to be binding upon the debtor in possession. [142a]
>
> 4. That the filing of the subject claim by COPAL subjected said claim to the scrutiny of the Bankruptcy Court for all purposes. [142a]
>
> 5. That the contentions advanced by COPAL are rejected as legally inapposite. [142a]

J. Appeal to the District Court

Copal appealed the decision of the Bankruptcy Judge to the United States District Court, Eastern District of New York [147a], which by opinion dated June 4, 1974, reversed the lower court and held:

1. The award of the JCAA is a final and conclusive judgment and entitled to be enforced in accordance with the United Nations Convention on the Recognition of Foreign Arbitral Awards and the Treaty with Japan on Friendship, Commerce and Navigation. [153a]

2. That to the extent of conflict between the treaties and the Federal Bankruptcy Act, the treaties, by virtue of the Supremacy Clause, control. [154a, 155a]

3. That the Bankruptcy Court is entitled to a limited review of the award of the JCAA in accordance with the

standard of review as set forth in the United Nations Convention on the Recognition of Foreign Arbitral Awards. [158a-162a]

Fotochrome thereupon appealed to this Court. [164a]

POINT I

THE TREATY WITH JAPAN ON FRIENDSHIP, COMMERCE AND NAVIGATION AND THE UNITED NATIONS CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS MANDATE THE ENFORCEMENT OF THE JAPANESE ARBITRAL JUDGMENT THEREBY RENDERING IT A PROVABLE DEBT FOR THE PURPOSES OF THE BANKRUPTCY ACT

Enforcement of the arbitral judgment rendered in favor of Copal is required by two treaties to which both the United States and Japan are signatories. Such enforcement in the United States pursuant to the treaties will make the arbitral judgment a provable debt for the purposes of the Bankruptcy Act. Bankruptcy Act, §63(a)(5), 11 U.S.C. §103(a)(5).

The two treaties are the Treaty with Japan on Friendship, Commerce and Navigation, April 2, 1953, 4 U.S.T. 2065, T.I.A.S. No. 2863 and 206 UNTS 143 ("FCN Treaty") and the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 21 U.S.T. 2517; T.I.A.S. No. 6997; 330 UNTS 3 ("United Nations Convention").

A treaty is, of course, the "supreme law of the land" [U.S. Const. Art. VI, §2, Hauensteing v. Lynham, 100 U.S. 483 (1879)], and the provisions of a treaty must prevail over any conflicting requirements of state law. Clark v. Allen, 331 U.S. 503, 508 (1946), as reaffirmed in Zschernig v. Miller, 389 U.S. 429 (1968).

Moreover, it is a well established principle that a treaty may supersede prior statements of federal law. The Supreme Court case of United States v. Lee Yen Tai, 185 U.S. 213 (1901) enunciated this principle at 220:

> That it was competent for the two countries by treaty to have superseded a prior act of Congress on the same subject is not to be doubted; for otherwise the declaration in the Constitution that a treaty, concluded in the mode prescribed by that instrument, shall be the supreme law of the land, would not have due effect. As Congress may by statute abrogate, so far at least as this country is concerned, a treaty previously made by the United States with another nation, so the United States may by treaty supersede a prior act of Congress on the same subject.

In addition, the Supreme Court has stated:

> By the Constitution, laws made in pursuance thereof, and treaties made under the authority of the United States, are both declared to be the supreme law of the land, and no paramount authority is given to one over the other.... If the treaty operates by its own force, and relates to a subject within the power of Congress, it can be deemed in that particular only the equivalent of a legislative act.... In either case the last expression of the sovereign will must control. The Chinese Exclusion Case, 130 U.S. 581, 600 (1889). (Emphasis added.)

These Supreme Court rulings constitute an explicit mandate for the application of the terms of the FCN Treaty and the United Nations Convention wherever in conflict with the Bankruptcy Law. The decision of the District Court recognized this fact as it stated that "the 1953 treaty with Japan and the 1970 United Nations Convention have superseded in small measure the 1938 Bankruptcy Law." [154a-155a]

The FCN Treaty states in pertinent part:

> Awards duly rendered pursuant to any such contracts, which are final and enforceable under the laws of the place where rendered, shall be deemed conclusive in enforcement proceedings brought before the courts of competent jurisdiction of either Party, and shall be entitled to be declared enforceable by such courts, except where found contrary to public policy. Treaty with Japan on Friendship, Commerce and Navigation, Art. IV, para. 2, 4 U.S.T. 2063 at 2068, T.I.A.S. 2863 at 7 (April 2, 1953). (Emphasis added.)

The arbitral judgment rendered to Copal meets the above requirements as it was final and enforceable under the laws of Japan. An explanation as to the finality of the arbitral judgment was presented at a hearing before the Bankruptcy Referee on the motion objecting to Copal's claim. At this hearing Copal's expert witness, Seiichi Yoshikawa, Esq., pointed out that an arbitral judgment of the JCAA has the same effect as a final and conclusive court judgment. [87a]

Fotochrome concedes that the arbitral judgment of the JCAA was final and enforceable under Japanese law, thus, "the award in favor of Copal, granted subsequent to the petition, upon deposit with the appropriate Japanese court, was conclusive, having the same effect as a judgment. Article 800 of the Japanese Code of Civil Procedure." (BR p. 7)* Accordingly, the arbitral judgment must be enforced pursuant to the term of the FCN Treaty.

The United Nations Convention states in pertinent part:

> Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or

* References ("BR p." -) are to Debtor-Appellant's brief.

higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards."

United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Art. III, 21 U.S.T. 2517 at 2519, T.I.A.S. 6997 at 3, 330 U.N.T.S. 38 at 40 (Dec. 29, 1970). (Emphasis added.)"

The District Court emphasized that the United Nations Convention required the courts of the United States to enforce the arbitral judgment of the JCAA and stated:

> Recognition of such foreign arbitral awards are mandated under the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, being treated much like a judgment under the Full Faith and Credit clause of the United States Constitution [152a].

Since the arbitral judgment was a final judgment in Japan, both the FCN treaty and United Nations Convention mandate that it be enforced in the United States.

The Bankruptcy Act does not require that Fotochrome, as debtor in possession, be made a party to the Arbitration Proceeding before the JCAA.

Fotochrome argues that the arbitral judgment of the JCAA is not enforceable in the United States because the debtor in possession was not made a party to the suit. In point of fact, the arbitral proceeding was not a trial or a suit to which the debtor in possession was required to have been made a party

under the Bankruptcy Act.* Fotochrome relies wholly upon the case of In re Barrett & Co., 27 F.2d 159 (S.D.Ga. 1928), to support the argument that the debtor in possession should have been joined according to the Bankruptcy Act. As Copal will demonstrate, not only is In re Barrett inapposite to the facts of this case, but even if Fotochrome were correct in its assertion, the treaties supersede the provisions of the 1938 Bankruptcy Act where in conflict. The Chinese Exclusion Cases, supra, at 600.

Accordingly, the arbitral judgment of the JCAA is entitled to be enforced within the courts of the United States and constitutes a provable debt under §63(a)(5) of the Bankruptcy Act, 11 U.S.C §103(a)(5), which provides for the provability of "debts reduced to judgments after the filing of the petition and before the consideration of the bankrupt's application for a discharge...."

Fotochrome, citing the 1928 case of In Re Barrett, supra, asserts that the arbitral judgment is not provable under

* 1A Collier on Bankruptcy §11.03 at 1146 (14th ed. 1974) states with respect to the term "suit" as used in §11a of the Bankruptcy Act, 11 U.S.C. §29(a) granting authority to stay "suits" against the debtor;
"The term, however, does not include arbitration proceedings..."
Research has revealed only one decision which addressed itself to this issue. In the Matter of the Markowitz Co., Inc., (Ref. S.D.N.Y.) 6 Am. Bankr. R. (n.s.) 221 (1925), Referee Davis in the Southern District of New York was presented with the situation of an arbitration which was in progress prior to the bankruptcy. Upon the receiver's application for a stay of the continuance of the arbitration proceeding, the Referee stated, in denying the application for a stay:

> "It does not seem to me that the arbitration proceeding instituted before the bankruptcy between the bankrupt and one of its creditors is a suit within the language of the Bankruptcy Act." Id. at 222

§63(a)(5) because the debtor in possession was not made a party to the arbitral proceedings nor directed by the Bankruptcy Court to defend. The Barrett case is distinguishable.

In the case of Riehle v. Margolies, 279 U.S. 219 (1928), Justice Brandeis, speaking for a unanimous court, characterized Barrett as one of a group of lower federal court cases which held:

> ...that a judgment recovered after institution of bankruptcy proceedings in an action commenced in a state court prior thereto, on a claim to which the limited power to stay action in a state court conferred by §11 of the Act of July 1, 1898, ... applies is not to be accepted in bankruptcy as conclusive proof of the claim. Id. at 228 (Emphasis added.)

As the opinion of the Court below clearly establishes, and Fotochrome admits, the Bankruptcy Court was without power to stay the proceedings before the JCAA. (BR. p. 11) Accordingly, the rule enunciated in Barrett does not apply in the instant case upon the authority of Riehle.

The facts of Riehle are strikingly similar to those of the instant case. In Riehle, a creditor commenced an equity receivership in the federal court and requested the appointment of a receiver for the debtor corporation. The court appointed Riehle as the receiver, and issued orders restraining the prosecution of all suits against the company and directing creditors to file their claims against the company with Riehle. Two months before the institution of the equity receivership in the federal court, Margolies had instituted a suit in a New York state court against the debtor corporation

for breach of contract. The debtor corporation had answered and counterclaimed in this state court action and the suit was pending when the receivership was commenced and the stay order issued. Margolies continued to prosecute his suit in the state court, and judgment by default was taken against the company when neither the receiver nor the attorney of record for the company appeared.

The question presented to the Supreme Court was whether the judgment obtained by Margolies in the state court should be accepted in the receivership proceeding as conclusive proof of the existence and amount of the claim. The Supreme Court unanimously answered this question in the affirmative. The fact that the federal court had exclusive jurisdiction of the property of the debtor corporation did not divest a state court of the power to liquidate a claim to that property, since the federal court lacked the power to stay the state court action.

Justice Brandeis explained:

> The contention that the judgment is not conclusive rests upon the argument that, because the appointment of the receiver draws to the appointing court control of the assets and in the distribution of them among creditors there is necessarily involved a determination both of the existence of the claim and of the amount of the indebtedness, the federal court must have the exclusive power to make that determination. The argument ignores the fact that an order which results in the distribution of assets among creditors has ordinarily a twofold aspect. In so far as it directs distribution, and fixes the time and manner of distribution, it deals directly with the property. In so far as it determines, or recognizes a prior determination of the existence and amount of the indebtedness of the defendant to the several creditors seeking to participate, it does not deal directly with any of the property. The latter

> function, which is spoken of as the liquidation of a claim, is strictly a proceeding in personam. Of course, no one can obtain any part of the assets or enforce a right to specific property in the possession of a receiver, except upon application to the court... But the judgment of the state court does not purport to deal with the property. The sole question involved there was the existence and amount of Margolies' claim against the corporation. And the sole question involved here is the proof of that claim. There is no inherent reason why the adjudication of the liability of the debtor in personam may not be had in some court other than that which has control of the res. . . . Riehle v. Margolies, supra, at 223, 224. (Emphasis added.)

The bankruptcy court in the instant case, like the federal court in Riehle, lacked the power to stay the pending action in the foreign tribunal. Fotochrome admits that the bankruptcy court lacked this power. (BR p. 11) Thus, it seems inconsistent for Fotochrome to argue that In re Barrett controls this case, for in Barrett, the bankruptcy court had the power to issue a binding stay, even if it chose not to exercise that power. In re Barrett, supra, at 161. It is on this basis that the Supreme Court in Riehle distinguishes Barrett and it is the only logical conclusion. It is erroneous to argue, as does Fotochrome, that a Japanese arbitration tribunal with in personam jurisdiction over an American corporation should, subsequent to the commencement by the American corporation of arrangement proceedings, halt its arbitration and join the same American corporation in its new status as debtor in possession.

In summary, the Bankruptcy Act contains no express mandate that a debtor in possession be named as a party to an action pending before the institution of a Chapter XI proceeding. The only authority for this proposition is case authority, such as In re Barrett. But as noted, In re Barrett has been distinguished by the Supreme Court to apply only to situations where the bankruptcy court has the power to stay a foreign action. In a situation

such as this, where the court lacked the power to stay the arbitration proceeding of the JCAA, there is no authority mandating the joinder of the debtor in possession in order to continue the arbitration. Nevertheless, even if the Bankruptcy Act did dictate that the debtor in possession be joined, the FCN Treaty and the United Nations Convention, as later expressions of the sovereign will, must control. Therefore, the Japanese judgment in favor of Copal must be deemed a provable judgment for the purposes of §63(a)(5) of the Bankruptcy Act.

POINT II

BOTH THE FACTS OF THIS CASE AND THE CONTROLLING LAW ESTABLISH THAT FOTOCHROME WAS ACCORDED DUE PROCESS BEFORE THE JCAA

Point I of Fotochrome's brief asserts that Fotochrome was denied due process of law because it was denied the opportunity to present its defense through the oral testimony of its witnesses. Perhaps this assertion results from Fotochrome's recent substitution of counsel and present counsel's unfamiliarity with the history of the case as documented by the record on appeal.

The minutes of the arbitration proceeding before the JCAA, put in evidence below, reflect that the following occurred:

From December 21, 1967 until January 27, 1970, a total of fifteen sessions of the JCAA were held and "counsel for Fotochrome was present at each of the above sessions." [110a]

"At the 14th session, held on October 1, 1969, counsel for Fotochrome requested the examination of two prospective witnesses [for Fotochrome] Mr. Knopf and Mr. Brown. The Arbitral Tribunal stated that these two witnesses would be examined on October 31, 1969." [110a]

The JCAA convened to hear the oral testimony of Fotochrome's witnesses, however:

"At the 15th session, held on December 4, 1969, neither Mr. Knopf nor Mr. Brown appeared for examination. The Arbitral Tribunal stated that the next session would be held on January 27, 1970." [110a]

On January 27, 1970, the JCAA once again assembled to hear Fotochrome's witnesses and, as the minutes of the arbitration proceeding document:

"At the 16th session, held on January 27, 1970, Mr. Knopf and Mr. Brown did not appear for examination." [110a]

Understandably disturbed by Fotochrome's continued refusal to present its witnesses, the JCAA chided Fotochrome's counsel for its dilatory tactics. Significantly:

"It was the <u>understanding of the Arbitral Tribunal and counsel for Fotochrome that if these two witnesses did not appear at the next session, the arbitration might be terminated.</u> The Arbitral Tribunal scheduled the next session, for March 31, 1970." [110a] (Emphasis added.)

On March 31, 1970, Fotochrome's counsel informed the JCAA that a stay order had been issued by the Federal District Court for the Eastern District of New York. [111a] Notwithstanding the agreement between the JCAA and Fotochrome's counsel:

"Counsel for Fotochrome further stated that he could not present his witnesses at the session, as had been previously scheduled." [111a]

"Counsel for Copal stated that if the Arbitral Tribunal was of the opinion that it could continue the arbitration proceedings regardless of the fact that an order had been issued, then the tribunal should so state and schedule a date for the next session." [112a]

By letter dated April 8, 1970, counsel for Fotochrome notified the Arbitral Tribunal that he had been discharged by Fotochrome "and that he could no longer attend the arbitral proceedings on behalf of Fotochrome." [112a]

Contrary to Fotochrome's assertion that it was denied due process because it was not given an opportunity to present its defense by oral testimony, the minutes of the JCAA proceedings establish that Fotochrome was given four distinct opportunities to present its defense but chose not to do so and ultimately withdrew from the proceedings.

Notwithstanding Fotochrome's withdrawal from the proceedings, the JCAA convened to determine whether it should adjudge Fotochrome's counterclaim as set forth in the briefs filed with the JCAA by Fotochrome's counsel. The JCAA's determination was complicated by the fact that Fotochrome, in complete disregard of several requests therefor, had failed to pay the administrative fee on its asserted counterclaim as required by the rules of the JCAA. [41a]

The very text of the JCAA's award, which not only reflects the tribunal's concern for a just and equitable resolution of the parties' dispute but also unequivocably negates Fotochrome's assertion that its case was not considered by the JCAA, states:

> We Arbitrators therefore have deliberated on the problem whether Respondent's such a [sic] counterclaim under such circumstances as seen in the above should be heard by the Arbitrators. The Commercial Arbitration Rules of the Arbitration Association contain no provisions to regard a claim of a party to the arbitration who does not pay the administrative fee as an invalid claim or to the effect that a party to the arbitration not paying the administrative fee may be thereby subjected to an unfavorable award. Therefore, it should be appropriate for the Arbitrators and it is so held by us that the Arbitrators should hear and give their judgment to such a claim of Respondent along with the hearing and adjudication of Petitioner's claim. [41a,42a]

The Bankruptcy Law Did Not Require Fotochrome To Withdraw from the Arbitration Proceedings

The applicable bankruptcy rules demonstrate that Fotochrome was not required to withdraw from the arbitration proceeding before the JCAA upon filing its petition for arrangement.

Pursuant to §342 of the Bankruptcy Act (11 U.S.C. §742), a debtor in possession is bestowed with the same powers and title as a trustee under the Act. Among the enumerated powers of a trustee under the Act is the power to prosecute, with the approval of the Court, any suit commenced by the bankrupt prior to the adjudication with like force and effect as though it had been commenced by the trustee. Section Eleven states:

> A receiver or trustee may, with the approval of the court, be permitted to prosecute as receiver or trustee any suit commenced by the bankrupt prior to the adjudication, with like force and effect as though it had been commenced by him. §11c, 11 U.S.C. §29.*

* The recently promulgated Bankruptcy Rule 610, 28 U.S.C. Chap. 131 §2075 (Rule 610) (Effective Oct. 1, 1973). expands upon Bankruptcy Act §342, 11 U.S.C. §742 and empowers a debtor in possession to prosecute or defend an action with or without the approval of the bankruptcy court. The rule states:

> The trustee or receiver may, with or without court approval, prosecute or enter his appearance and defend any pending action or proceeding by or against the bankrupt, or commence and prosecute any action or proceeding in behalf of the estate, before any tribunal. Id.

Thus, Fotochrome, as a debtor in possession, had the normal choices of a trustee in bankruptcy with respect to the continuation of its pending action. It could have intervened and assumed the continued prosecution of the action as debtor in possession or declined to take over prosecution because of the likelihood of involving the estate in fruitless litigation. 4A Collier on Bankruptcy, §70 at 384, 385 (14th ed. 1974); Meyer v. Fleming, 327 U.S. 161 (1946); Paradise v. Vogtlandische Maschinen-Fabrik, 99 F. 2d 53 (3rd Cir. 1938). Fotochrome, as debtor in possession, when informed that the JCAA was going to continue the arbitration without it, chose the latter alternative. Fotochrome thereby failed to take the necessary and available action to continue the prosecution of its claim against Copal.

Clearly Fotochrome's failure to advance its position before the JCAA was wilful and not mandated by the Bankruptcy Act. Accordingly, Fotochrome's refusal to utilize the four separate opportunities to present its case before the JCAA and Fotochrome's refusal to continue to participate in the arbitration proceedings once it filed a petition for arrangement does not support the proposition that the JCAA or Copal prohibited Fotochrome from being present at each and every stage of the arbitration proceeding.

Both New York Law and Federal Law Require Recognition of Foreign Judgments Even if Obtained Upon Default

The facts of the instant case demonstrate that the

arbitral judgment of the JCAA was not tantamount to a default judgment; however, even if the arbitral judgment is so characterized both New York law and Federal law require that it be enforced by the courts of the United States. This rule was enunciated by the Supreme Court in the 1928 case of Riehle v. Margolies, supra, wherein the Court stated at 225:

> A judgment of a court having jurisdiction of the parties and of the subject matter operates as res judicata, in the absence of fraud or collusion, even if obtained upon a default.

Both New York law, pursuant to the New York Uniform Foreign Country Money Judgments Recognition Act, N.Y. Civ. Prac. Law §§5301-09 (McKinney 1970), and Federal Law, pursuant to the United Nations Convention, require recognition of foreign arbitral judgments which result from proceedings in which the American party defaults. New Central Jute Mills Co. v. City Trade & Industries, Ltd. 65 Misc. 2d 653 (Sup.Ct., N.Y. Co. 1971), Island Territory of Curacao v. Solitron Devices Inc., 356 F. Supp. 1 (S.D. N.Y. 1973)

In Island Territory of Curacao, an American semiconductor manufacturer, Solitron, entered into a contract with the Island Territory of Curacao, the terms of which required, inter alia, the arbitration of any and all disputes before an arbitration tribunal in Curacao. In order to facilitate arbitration, Solitron appointed local counsel as its agent for the receipt of process. Subsequently, a dispute arose between the parties and a demand for arbitration was served upon Solitron. Solitron, much like Fotochrome

herein, discharged its local counsel and refused to participate in the arbitration proceedings. Nevertheless, the arbitration tribunal proceeded with the arbitration and granted an award in favor of Curacao.

Pursuant to the provisions of the United Nations Convention, Curacao commenced enforcement proceedings in the United States. Solitron opposed enforcement of the award and, as Fotochrome herein, asserted that the nature of the proceeding was such as to constitute a denial of due process. The District Court rejected Solitron's argument and stated at 13:

> Where a party is sued in a foreign country upon a contract made there, he is subject to the procedure of the court in which the action is pending, and must resort to it for the purpose of his defense, if he has any, and any error committed must be reviewed or corrected in the usual way. So long as he has the benefit of such rules and regulations as have been adopted or are in use for the ordinary administration of justice among the citizens or subjects of the country, he cannot complain, and justice is not denied to him. The presumption is that the rights and liability of the defendant have been determined according to the law and procedure of the country where the judgment was rendered. Dunstan v. Higgins, 138 N.Y. 70 (1893)

Fotochrome could have commenced a procedure to cancel the arbitral judgment of the JCAA in the courts of Japan. The Japan Code of Civil Procedure §801 ("CCP") enumerates specific grounds upon which a party may apply to a Japanese court for cancellation of an arbitration award. In addition to the traditional grounds for cancelling an award such as fraud, bias and corruption, the

CCP specifically states that an award may be cancelled if a party can prove that he was not given an opportunity to be examined in the arbitration proceeding. Article 801 (4) of The Japan Code of Civil Procedure.

If Fotochrome seriously believed that it was denied the opportunity to present its case before the JCAA, it could have made an application, predicated upon its due process argument, to the Japanese District Court for cancellation of the arbitral judgment. The failure of Fotochrome to utilize the available Japanese procedure** precludes it from raising a due process argument in this Court. Cf. Cook Industries, Inc. v. C. Itoh & Co. (America) Inc., 449 F.2d 106 (2d Cir. 1971).

As stated by the Court in Island Territory of Curacao:

"Solitron [like Fotochrome herein] had an opportunity to urge this point before the arbitrators or in the courts of Curacao but elected to forego the opportunity. This Court may not now correct the alleged error." Island Territory of Curacao v. Solitron Devices Inc., supra, at 13.

In New Central Jute Mills Co. v. City Trade & Industries, Ltd., supra, the defendant failed to participate in two arbitration proceedings before an Indian arbitration panel which were commenced by the plaintiff pursuant to the terms of the parties' contract. Subsequent to the awards but prior to their reduction

** Moreover, Japan has a comprehensive insolvency law which is in many respects similar to that of the United States. The Japanese law provides for bankruptcy, reorganization, and compositions and is available on an equal basis to domestic and foreign corporations. Fotochrome could have sought the protection of this law for its Japanese property. Bankruptcy Law (of Japan) (Law No. 71,1922, as amended by Law No. 100,1971)

to judgment by the High Court of Calcutta, the defendant commenced an accounting action in the Supreme Court of the State of New York. The Supreme Court ordered arbitration of the parties' dispute but the parties stipulated to stay this order.

Once the Indian awards were reduced to judgments, the plaintiff commenced enforcement proceedings in New York. Defendant opposed enforcement and argued that the parties' stipulation which had been entered into with respect to the Supreme Court action amounted to a stay of the Indian arbitration proceeding. Defendant also argued that it was not afforded adequate notice of the confirmation proceedings and that therefore the award contravened the public policy of the state because it violated traditional notions of due process.

The Court rejected defendant's argument and stated at 657:

> Having been amply notified of the plaintiff's intention to proceed with the confirmation of the awards in India, defendant now can hardly claim to have been defrauded or misled. Nothing in this record indicates that the Indian judgment obtained by the plaintiff is repugnant to the public policy of this State nor, more than ample notice having been accorded to defendant at all times, can it be claimed that the judgment rendered was incompatible with our notions of due process.

Accordingly, the award of the JCAA does not violate the due process clause of the Fifth Amendment of the United States Constitution.

The Public Policy Of The United States Requires The Recognition and Enforcement of Commercial Arbitration Agreements in International Contracts

Fotochrome has essentially asserted, for the first time in this Court, that the arbitration clause of the parties' transnational contract violates the public policy of the United States. However, the public policy of the United States with respect to arbitration agreements such as that involved in the instant case is explicitly set forth in the United States Arbitration Act, 9 U.S.C. §§1 et seq. (1947) which reads, in pertinent part, as follows:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract. Id. §2.

The emerging public policy of the United States, as evidenced by two recent Supreme Court cases, favors the enforcement of contractual agreements for arbitration of international disputes even at the expense of existing and apparently conflicting domestic legislation. Scherk v. Alberto-Culver Co., 42 U.S.L. Week 4911 (U.S. June 17, 1974); M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972).

In Scherk v. Alberto-Culver Co., supra, an American manufacturer and distributor of toiletries, entered into a contract for the purchase of the stock of three interrelated German and Liechtenstein businesses owned by Scherk together with all rights held by these enterprises to trademarks in cosmetic goods. The contract provided for the resolution of any and all disputes before the International Chamber of Commerce in Paris, France and stipulated that the interpretation of the contract should be governed by the law of Illinois.

Subsequent to the consummation of the parties' contract, Alberto-Culver Co. ("Culver") discovered that the trademarks were subject to substantial encumbrances. Culver thereupon instituted suit in the United States District Court for the Northern District of Illinois. Culver contended that because Scherk's fraudulent representations concerning the trademarks violated §10(b) of the Securities Exchange Act of 1934 and Rule 10-b-5 promulgated thereunder, the arbitration clause contained within the parties' international contract was unenforceable under the holding of Wilko v. Swan 346 U.S. 427 (1953)*. The District Court granted a preliminary order enjoining Scherk from proceeding with

*Wilko v. Swan, supra. held that an agreement to arbitrate could not preclude a buyer of a security from seeking a judicial remedy under the Securities Act of 1933, in view of the language of §14 of the Securities Act of 1933.

arbitration and this order was affirmed by the United States Court of Appeals for the Seventh Circuit. 484 F. 2d 611 (7th Cir. 1973)

The United States Supreme Court reversed the judgment of the Court of Appeals and stated:

> A contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is, therefore, an almost indispensable pre-condition to achievement of the orderliness and predictability essential to any international business transaction. Furthermore, such a provision obviates the danger that a dispute under the agreement might be submitted to a forum hostile to the interests of one of the parties or unfamiliar with the problem area involved.
>
> A parochial refusal by the courts of one country to enforce an international arbitration agreement would not only frustrate these purposes, but would invite unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages. (42 U.S.L Week at 4914).

In M/S Bremen v. Zapata Off-Shore Company, supra, the Supreme Court held that a forum clause in an international towage agreement, which stipulated that all disputes should be resolved before the High Court of London, was controlling despite the fact that the English courts would enforce an exculpatory clause which would not be applied by American admiralty courts.

The Court stated at 17:

> This case, however, involves a freely negotiated international commercial transaction between a

> German and an American corporation for towage of a vessel from the Gulf of Mexico to the Adriatic Sea. As noted, selection of a London forum was clearly a reasonable effort to bring vital certainty to this international transaction and to provide a neutral forum experienced and capable in the resolution of admiralty litigation. Whatever 'inconvenience' Zapata would suffer by being forced to litigate in the contractual forum as it agreed to do was clearly foreseeable at the time of contracting. In such circumstances it should be incumbent on the party seeking to escape his contract to show that trial in the contractual forum will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court. Absent that, there is no basis for concluding that it would be unfair, unjust, or unreasonable to hold that party to his bargain.

The instant case presents another situation in which the terms of a private international agreement should be given full effect. Although recognition and enforcement of the JCAA arbitral judgment is mandated by the United Nations Convention and the FCN Treaty, the granting of recognition to this award would also be consonant with the expressed public policy of the United States.

Conclusion

For the reasons stated herein, we respectfully request that the decision of the United States District Court for the

Eastern District of New York be affirmed on the law and the facts of the case.

Dated: New York, New York
January 10, 1975

Respectfully submitted,

WHITMAN & RANSOM
Attorneys for Claimant-Appellee
Copal Company Limited
Office & P.O. Address:
522 Fifth Avenue
New York, New York 10036

Dugald Campbell Brown
William M. Kahn
Gillard S. Glover

Of Counsel

Received 2 copies of the within

Brief for Claimants - appellee

this 10 day of Jan, 19 75

Sign Raymond F. Gregory/PG

For: ~~Raymond F. Gregory~~ Esq(s).

Att'ys for Debtor - Appellant